United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

76-1131
76-1160

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-1131, 76-1160

UNITED STATES OF AMERICA,
Appellee,

—against—

JAMES SEELEY CYPHERS and JAMES W. FERRO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellants James Cyphers and James Ferro appeal from judgments of conviction entered on March 5, 1976 after a jury trial in the United States District Court for the Eastern District of New York (Platt, *J.*) on two indictments charging them with devising a scheme and artifice to defraud and to obtain money from various airline companies by means of the use of altered credit cards and identifications. Two mailings in furtherance of the scheme were charged against both appellants in 74 CR 322 and one additional mailing was charged against both appellants in 75 CR 259, all in violation of Title 18 U.S.C., §§ 1341 and 2. The two indictments were consolidated for trial.

Appellant James Cyphers was sentenced to five years imprisonment and a fine of $1000 on the first count of 74 CR 322. A sentence of five years on the second count

of 74 CR 322 was suspended, and Cyphers was placed on probation for five years to commence after the service of the prison term. An additional fine of $1000 was assessed for the second count. Cyphers was also sentenced to a concurrent term of five years on 75 CR 322 and a fine of $1000, for a total fine of $3000.

Appellant James Ferro was sentenced to four years imprisonment and a fine of $1000 on the first count of 74 CR 322. A sentence of four years on the second count of 74 CR 322 was suspended and Ferro was placed on probation for five years to commence after the service of the prison term. An additional fine of $1000 was assessed on the second count. Ferro was also sentenced to a concurrent term of four years on 75 CR 322 and a fine of $1000, for a total of $3000.

Both appellants are on bail pending this appeal.

Both appellants claim that the evidence adduced at trial was insufficient to support a finding that the mails were used in furtherance of the fraudulent scheme and that the use of the mails was foreseeable. Both appellants also claim a failure of proof that the airline tickets that were the subject of the charged mailings were obtained as part of the fraudulent scheme. Appellants also contend that the admission of evidence concerning the fraudulent scheme which was evidence of other crimes was error. Both appellants claim that the Government violated the Eastern District Plan for the Prompt Disposition of Criminal Cases and appellant Ferro claims a denial of the right to a speedy trial. In addition, appellant Cyphers claims that the district court, in not permitting him to personally give a summation, denied him his right to act as his own counsel.

Statement of Facts

The evidence adduced at trial showed that the appellants were involved in a broad scheme to defraud various airlines by purchasing airline tickets with credit cards that had been lost or stolen and which were subsequently altered. False identifications were used in connection with these purchases. The airline tickets so purchased were sold at a discount.

The two indictments under which the appellants were tried charged three mailings in furtherance of the scheme: Count I of 74 CR 322 involved a mailing to Dr. I. Simon on or about February 3, 1973; Count II of 74 CR 322 involved a mailing to Dr. Stuart Sylvan on or about February 19, 1973; and Count I of 75 CR 259 involved a mailing to Dr. I. Simon on or about February 26, 1973.

During 1973, Dr. I. Simon, a dentist, who had occasion to travel frequently to Florida from Long Island was told by George Nagin, his long time friend and jeweler, that airline tickets for Florida could be obtained at a discount (190-192, 243-245).[1] Dr. Simon first took advantage of the availability of the discount tickets by purchasing round trip tickets for a February 8, 1973 flight from JFK to West Palm Beach (243). He called Nagin and had him order the tickets for him (244). After he paid Nagin, Dr. Simon received the tickets in the mail (244, 256-257).

Thereafter, again in February, 1973, Dr. Simon needed additional airline tickets to Florida (245). However, Nagin was in Florida and Dr. Simon had to go to Nagin's Manhattan office to pick up tickets that he

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[1] References are to the trial transcript.

ordered through Nagin's business associate (245-246). At Nagin's office, Dr. Simon met a man named "Jimmy" [2] who gave him the tickets he ordered (246-247). At the same time, Dr. Simon ordered tickets for his partner Dr. Stuart Sylvan (247). Dr. Sylvan received the tickets that he had requested Dr. Simon to order in the mail on or about the 13th or 14th of February, 1973 (230-231, 241).

Again, around the end of February, 1973, Dr. Simon purchased airline tickets through Nagin for a flight between JFK and Florida (247-248). These too were received in the mail (248). Dr. Simon identified those tickets (Exs. 45 & 46, 248-249).

George Nagin testified that he had been told by appellant Cyphers about the availability of cheap airline tickets and that he had purchased tickets from Cyphers, at a discount, for his personal use (193-195). Nagin also testified that Dr. Simon had first ordered tickets through him in February, 1973 giving him the dates and money. Thereafter Cyphers or Ferro, Cyphers' nephew, picked up the money (197). On the only other occasion when Nagin ordered tickets for Dr. Simon, also in February 1973, the transaction was conducted in the same manner (198, 210). Cyphers had given Nagin his telephone number in order that he could be reached for orders and Nagin gave this number to Dr. Simon (199-200).

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[2] While Dr. Simon did not identify either appellant as being the "Jimmy" he met, he did testify that Nagin subsequently gave him the phone number of "Jimmy", who Nagin said was the same person whom Dr. Simon had previously met (250). This telephone number, 832-1211, when called by Dr. Simon, was answered by an answering machine (251-252). This telephone number was proven to have been installed together with an answering device in appellant Cyphers' apartment (394-395).

On March 19, 1973 an arrest warrant for both appellants was issued on the complaint of a Postal Inspector charging them with mail fraud in that, in furtherance of a scheme to defraud airlines, they caused invoices to be mailed to various credit card companies. The warrant was executed against both appellants on March 20, 1973 at Cypher's apartment, 14-D, at 303 East 57th Street, New York, New York (35-36, see also 115-116). Consent to conduct a search of the apartment was obtained from Cyphers and various drivers' licenses, credit cards, and other credit card-related paraphernalia were seized (39-64).

Three credit cards, all with Ferro's handwriting on them (300-310), were found in Cypher's briefcase: a credit card with the name Redstrom Company and Richard Redstrom on it (Ex. 5), a credit card with the name Arthur Mastmond on it (Ex. 6), and a credit card with the name Douglas Eppollitto on it (Ex. 7) (41-44, 53).

Three falsified Florida driver's licenses (278-282), each bearing Ferro's handwriting (300-310), were also found in Cypher's briefcase: one in the name of Richard Redstrom (Ex. 8-A), another in the name of Arthur Mastmond (Ex. 8-B), and another in the name of Douglas Eppolitto (Ex. 8-C) (45-47). A credit card validator (38), and various credit card company bulletins reporting stolen credit cards (47-50) were also found in the apartment (38-49).

The Redstrom and McKinley Cards

Richard Rooney, manager of Commercial Credit for United Airlines, testified that a credit card bearing the account number found on the Redstrom credit card was issued by United Airlines to Richard Hedstrom of the

Hedstrom Company (120). Richard Hedstrom testified that he lost his card at the Statler Hilton Hotel in New York City on February 23, 1973, and had immediately notified United Airlines of the loss (151-153).

The credit manager identified a batch of airline ticket charge slips indicating purchases on the Hedstrom account number, in some cases showing the name "Hedstrom" and in others "Redstrom" imprinted on the slips (Exs. 31, 124-125). All of these charges were incurred after the date the loss of the Hedstrom card was reported (131-132). The credit manager also identified the charge slip for tickets for "I. Simon—G. Nagin" purchased February 26, 1973 at Boston, Massachusetts on the Hedstrom credit card (Exs. 32, 125-126, 129).[3] The airline received no payment for these tickets (102).

Rooney examined the Redstrom credit card and testified that the initial "R" in the word Redstrom was not in line with the rest of the lettering and that the credit card had been altered (135-136). Rooney also identified another United Airlines credit card, the William McKinley card (138). The McKinley card bore an account number for a card issued to William F. Finley, but it, like the Redstrom card, had been altered (138, 143-144). This credit card had been reported lost in October or November, 1972 and following its reported loss it was used to purchase airline tickets (144-145, 164-165).

The signatures on the Redstrom and McKinley charge slips were identified as being that of appellant Ferro (300-310). The McKinley card was recovered after

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[3] The tickets identified by Dr. Simon (Exs. 45 and 46) were purchased on February 26, 1973 at Boston, Massachusetts with the Hedstrom credit card.

Ferro, who was identified at trial as the person who had abandoned it at an Eastern Airlines ticket counter in Baltimore, Maryland, had attempted to purchase a ticket with this card (265-267).

The Epollitto and Mastmond Cards

Frank J. McDonald, a security investigator for Eastern Airlines, testified that a credit card bearing the account number found on the Epollitto credit card was issued to Douglas E. Pollitt (88). Notification of the loss of this card was received in January 1970 (89). Various airline ticket charge slips used for purchases with this card after its reported loss, both in the name of Pollitt and subsequently Eppollito, were identified (Exs. 25, 92-93). McDonald examined the Eppollito credit card and stated that the name Eppollito contained altered letters (94-98). McDonald also testified that a credit card bearing the account number found on the Mastmond credit card was issued to Arthur M. Simon and that this card had been reported lost or stolen (107-110). He identified a batch of airline tickets purchased on the account number, some bearing the imprinted name "Arthur M. Simon" and others "Arthur Mastmond" (112). These charges were all rejected by Simon (113). The signatures on the Eppollitto and Mastmond charge slips were established as being that of appellant James Ferro (300-310).

The Fred Preston Staff Card

Scott Kale, who in September, 1972 was a clerk at a Doubleday Bookstore, identified James Cyphers as the man who made a purchase with a credit card bearing the name Fred Preston Staff (168-169). It was stipulated

that the Fred Preston Staff credit card had been reported lost prior to this purchase (162). The Doubleday charge slip (Ex. 41) and three airline ticket charge slips (Exs. 42A, B & C), were stipulated to have been charges incurred with the Staff credit card after its reported loss (162).

It was established that the signatures on the airline ticket charges and Doubleday charge incurred with the Fred Preston Staff card were written by appellant James Cyphers (287-288).

The Defense

Neither appellant took the stand. Richard Doherty, an electronics engineer, testified for Cyphers apparently to show that Cyphers' telephone might have been answered elsewhere and that calls to Cyphers' apartment might have been intercepted (404-405, 441-443).

ARGUMENT

POINT I

The Evidence was Sufficient to Support the Verdicts Against the Defendants.

Both appellants argue that the evidence of the use of the mails was insufficient to bring their conduct within the coverage of Title 18, United States Code, § 1341. They also argue that the evidence was insufficient to charge them personally with the use of the mails. Finally, they argue that the evidence was insufficient to establish that the charged mailings involved tickets that were fraudulently obtained.

In *United States* v. *Finkelstein*, 526 F.2d 517, 526-527 (2d Cir. 1975), the Second Circuit held that to sustain a conviction for mail fraud, there must be "sufficient evidence in the record to permit a jury to infer beyond a reasonable doubt that a scheme or artifice to defraud existed, that the participants in the scheme caused the mails to be used in furtherance of the scheme, and that the defendant was a participant in the fraudulent scheme". Each of the necessary elements, as discussed below, was proven beyond a reasonable doubt.

A. The Existence of a Scheme or Artifice to Defraud

The appellants were charged in the two indictments with devising a scheme to defraud various airline companies and to obtain money and property by means of false and fraudulent pretenses by using lost or stolen credit cards to purchase airline tickets without intent to pay for them and selling these tickets.

The evidence admitted at trial was sufficient to permit a jury to infer beyond a reasonable doubt that the alleged scheme to defraud existed. Representatives from United Airlines and Eastern Airlines testified to numerous airline tickets purchased with the three credit cards found in Cyphers' briefcase, as well as the McKinley and Staff cards, that had been reported lost or stolen and that had, prior to many of the purchases, been altered. These tickets were never paid for.

The appellants objected to the offer of evidence by the government relating to the existence of the fraudulent scheme, but not directly related to the three mailings charged in the two indictments, claiming this was offered to prove other crimes solely to show the criminal character of the appellants. This evidence, including the post-loss or theft history of the use of five credit cards, was

admissible to directly prove the existence of the scheme to defraud. Evidence directly relating to a necessary element of the charged offense, the existence of the scheme, is admissible, both under Federal Rule of Evidence 404 (b), as proof of "plan", see e.g. *United States* v. *Light*, 394 F.2d 908, 912-913 (2d Cir. 1968); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 519 U.S. 723 (1975), and also because the proof is directly related to the charge in the indictment. See *United States* v. *Stull*, 521 F.2d 687, 690 (6th Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 794 (1976) and cases cited therein. Therefore, it was not error for the trial court to have admitted this evidence.

B. The Appellants were Participants in the Fraudulent Scheme.

To be guilty of mail fraud one need not be a party to the formation of the fraudulent scheme. *Kaplan* v. *United States*, 18 F.2d 939 (2d Cir. 1927). Nor need one personally mail the letters involved in the actual counts. *United States* v. *Finkelstein*, *supra* at 527 and cases cited. To be guilty one must participate in the scheme, but one need not necessarily be directly involved in the transactions underlying the particular mailings charged. *Ibid.* All that is required is that it be reasonably forseeable to the participant in the fraudulent scheme that the scheme would involve the use of the mails. *Ibid.*

Appellant Ferro's participation in the fraudulent scheme was established by his dealings with George Nagin, the middleman for the purchase of airline tickets handwriting on four of the altered credit cards, which by Doctors Simon and Sylvan; the identification of Ferro's

were used to purchase airline tickets as established by the United and Eastern witnesses; the identification of his handwriting on the false drivers' licenses, which licenses corresponded to the altered names on the credit cards; and the identification of Ferro as the person who attempted to use an altered credit card, the McKinley card, to purchase an airline ticket in Baltimore, Maryland.

Appellant Cyphers' participation in the fraudulent scheme was established by his dealings with George Nagin, the use of his phone number to order airline tickets, and the use of the Fred Preston Staff credit card to purchase airline tickets after the card had been reported lost.[4] Cyphers was also connected with the three altered credit cards used by Ferro. These cards were found in his briefcase during the search of his apartment.

The foreseeability of the use of the mails was similarly established. Appellant Ferro was identified, through handwriting analysis, as having purchased the airline tickets which formed the basis of Count One of 75 Cr. 259 (Exs. 45 & 46). These tickets were purchased in Boston, Massachusetts and were received in the mail by Dr. Simon, who testified that they had been mailed "special delivery", with a lot of postage (250). An examination of other charge slips for tickets purchased by Ferro in Boston on the same day, with the same credit card, demonstrates the necessity for the use

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[4] Cyphers was connected to the use of the Fred Preston Staff card by the testimony of Scott Kale and by the testimony of the handwriting expert, who stated that Cyphers signed both the charge slips for the airline tickets purchased with the Staff card, and the Doubleday purchase.

of the mails. Thus, the charge slips in Exhibit 31 (tickets purchased with the Redstrom credit card) show that tickets were purchased in Boston, for flights leaving not only from New York, but also from Newark, New Jersey, Chicago, Illinois, Cleveland, Ohio, and Los Angeles, California. These tickets were all purchased for use by persons other than Ferro. It is clear that the delivery of these tickets could only be accomplished as a practical matter by use of the mails. Examination of the charge slips for airline tickets purchased with the other altered credit cards, on which Ferro's signature appears (Exs. 25, 29, 39) shows a similarly wide geographic dispersal between the place of purchase and the place of intended use.

The use of the mails was also foreseeable to appellant Cyphers who had used the Fred Preston Staff credit card to illegally purchase airline tickets. Cyphers purchased a ticket in the name of Fred Preston Staff for the use of a Mr. and Mrs. Ross. This ticket, Exhibit 41C, was purchased in Newark, New Jersey, for a flight scheduled to depart from Los Angeles, California. This purchase of a ticket in one city, for use in a distant city, evidences the necessity for the use of the mail to distribute the ticket.

Therefore, as has been seen, the use of the mails was certainly foreseeable and indeed an integral part of the scheme, where tickets, purchased with stolen or lost cards, were bought by both appellants in one airport for use by travellers at an airport located in a distant city.

C. The Mailings Charged In The Indictment Were Done In Furtherance Of The Scheme.

Both appellants argue that wholly aside from their participation in a scheme to defraud and from the use of the mails to deliver the airlines tickets purchased as

part of that scheme, the mailings proved in this case were not cognizable under the mail fraud statute because they were not made in furtherance of the scheme. This claim is without merit. Indeed, the nature and operation of the fraudulent scheme itself, and in which the appellants participated, shows that the mailings were an essential part of the scheme. The scheme involved the obtaining of orders for airline tickets and the "purchase" of these tickets with lost, stolen or altered credit cards and without intent to pay for them. The profit in the scheme came from the payment by the individual ordering the tickets. The mails were then used to deliver the tickets to these individuals. It is only of incidental importance that Doctors Simon and Sylvan paid for their tickets in advance of receipt, since it is clear that the scheme contemplated repeated orders for airline tickets from satisfied customers and the use of the mails to make delivery of the tickets.

The victims, here the airline companies, need not be the recipient of material that is mailed. *United States* v. *Brewer*, 528 F.2d 492, 497 (4th Cir. 1975). All that is required is that the mail be used in furtherance of the illegal scheme. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 526. Such use may be found where the mails are used to enable the schemers to realize the fruits of their scheme. *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Sampson*, 371 U.S. 75 (1962). In *Sampson*, sufficient use of the mails was found to exist where it occurred after the victim's money had been obtained *Id*, at 80. Similarly, in *United States* v. *Marando*, 504 F.2d 126, 130 (2d Cir.), *cert. denied*, 419 U.S. 1000 (1974), the statute was held to include a use of the mails where the mailings were a "regular and contemplated step" and were also used to obtain further financing.

In the instant a[illegible]l, the mailings of the airline tickets to the persons who paid for them were also "regular and contemplated steps" which served the dual purpose of keeping the customers satisfied, thus causing them to order more tickets and causing them not to complain to the authorities.

The appellants' cite *United States* v. *Maze*, 414 U.S. 395 (1974) in support of their position. However, *Maze*, together with *Kahn* v. *United States*, 323 U.S. 88 (1944) and *Parr* v. *United States*, 363 U.S. 370 (1960) are clearly distinguishable from the situation here. In each of those three cases, the mailings on which the prosecution relied were carried out by neutral third persons who were in no way involved in the scheme. See *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974); *United States* v. *Vanderpool*, 528 F.2d 1205, 1207 n. 4 (4th Cir.), *cert. denied*, — U.S. —, 96 S. Ct. 1131 (1976). In *Maze*, a motel, in *Karr*, a bank, and in *Parr*, an oil company used the mails not to continue or complete the fraud, nor in any way to benefit the defrauders, but only for the purpose of adjusting accounts. See *Maze*, *supra*. 414 U.S. at 400-401. Here, however, the mails were used by the participants themselves, for the purpose of continuing and enlarging the fraud and preventing dissatisfaction that might lead to exposure. As such, the mailings were done in furtherance of the illegal scheme.

POINT II

Neither the Eastern District Plan for the Prompt Disposition of Criminal Cases Nor the Constitutional Right to a Speedy Trial Was Violated.

Both appellants argue that the government violated the Eastern District Plan for the Prompt Disposition of Criminal Cases (hereinafter "the Plan") and appellant Ferro argues that he was denied his right to a speedy trial.

A. The Plan

The Plan in effect during the course of this case below did not mandate trial within a specified period of time, rather it required that the government be ready for trial within six months from arrest or other specific event, as set forth in Rule 4 of the Plan. *Hilbert* v. *Dooling*, 476 F.2d 355, 357 (2d Cir.), *cert. denied*, 414 U.S. 878 (1973). An examination of the relevant pre-trial history of the proceedings below demonstrates that the government fully complied with the Plan.

Based on a complaint by the Postal Inspector, Robert McDowall, (Ex. A to Affidavit of McDowall, Document #9 to Record on Appeal) arrest warrants were issued for the appellants on March 19, 1973. These warrants were executed on March 20, 1973. An examination of the McDowall complaint makes it clear that the arrest warrants were issued for the offense of mail fraud, Title 18 U.S.C. §§ 1341, 1342 and 2, with the relevant mailings set forth in the second paragraph of page 2.

> "The defendant James Seeley Cyphers and the defendant James W. Ferro caused to be mailed by

> the United States mail in the Eastern District of New York a number of invoices, including but not limited to the following credit card companies: Diners' Club Credit Card Company, Carte Blanche Credit Card Company and American Express Credit Card Company, etc. . . ."

Thus, the mailings for which the appellants were arrested on March 20, 1973 were the mailings of invoices to credit card companies. These were neither the type of, nor the specific, mailings for which the appellants were tried.

On September 18, 1973, a forty-three count indictment was filed against the appellants. Of the 43 counts, all but 3 involved the mailings of invoices. These latter three counts involved the mailing of tickets to individual purchasers rather than the invoices (Counts 20, 21, and 22).

On September 19, 1973, a notice of readiness was filed [5] and Cyphers entered a plea of not guilty on September 20, 1973. Ferro, who was produced in the district court from a state prison in Ohio by means of a writ of habeas corpus ad prosequendum, entered a plea of not guilty on October 12, 1973.

Both appellants moved to dismiss the indictment based on *United States* v. *Maze, supra*, which was decided by the United States Supreme Court in January 1974.

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[5] While the filing of a notice of readiness is ineffective if prior to the entry of a plea, this Count has held that where such filing occurred before its decision in *United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974), it would be excusable neglect for the prosecution to think that the filing would satisfy the Plan. *United States* v. *Bowman, supra*, 493 F.2d at 597-598.

Thereafter, on April 15, 1974, the government moved to dismiss the 73 CR 848 original indictment, and indicated that it would supersede the original indictment (Transcript, April 5, 1974 p. 3). The court granted the government's motion, giving it three weeks to supersede (Transcript, April 5, 1974 p. 4). Thus, the dismissal was prospective to April 26, 1974 (Transcript, April 5, 1974 p. 9).

On April 23, 1974, a new indictment (74 CR 322) was filed charging the appellants with two Counts of mailings of airline tickets. The first Count was derived from Count 20 of the original indictment (73 CR 848). The government filed its notice of readiness on May 13, 1974. A third indictment (75 CR 259), charging another mailing of an airline ticket, was filed on April 1, 1975 and a notice of readiness was filed on June 6, 1975. Trial of these two indictments, 74 CR 322 and 75 CR 259, commenced on January 5, 1976.

Neither of the appellants were arrested for the type of mailing for which they ultimately were tried, thus it is contended by the government that the six month time period began to run as to Count 1 of 74 CR 322, on September 18, 1973, when the original indictment, 73 CR 848, which contained Count 20, was filed.

The arrest of the appellants was based on the charge that they caused innocent third parties to mail invoices to credit card companies. The subsequent indictments on which the appellants were tried were based on mailings by members of the scheme themselves. The mailings of invoices were subsequently held not to be of the type that could form a basis for a federal mail fraud prosecution. *Maze* v. *United States*, *supra*. Thus, unlike the case in *United States* v. *Furey*, 500 F.2d 338, 342 (2d Cir.

1974), the appellants were not tried on the type of charges for which they were arrested. In *Hanrahan* v. *United States*, 348 F.2d 363 (D.C. Cir.), *cert. denied*, 389 U.S. 845 (1967), cited by the appellants, it was held that the government could not avoid the structures of the speedy trial requirement merely by charging similar mailings to different persons. In the case at bar the mailings for which the appellants were arrested were of a completely different type than those for which they were tried and, further, the issue in the case at bar is the prompt readiness rule, not the speedy trial rule. *Hilbert* v. *Dooling*, *supra*, 476 F.2d at 357.

The notice of readiness pertaining to 73 CR 848 was filed on September 19, 1973, the day after the indictment was returned. Cyphers was arraigned the following day, September 20, 1973, and Ferro was arraigned on October 12, 1973.

The second indictment, 74 CR 322, was filed on April 23, 1974 and the notice of readiness was filed on May 13, 1974, 20 days later. It may be argued that, as to Count One of 74 CR 322, the government is chargeable with the period between the prospective dismissal of 73 CR 848, on April 5, 1974 and the filing of the new indictment, on April 23, 1974, a period of 18 days.[6] However, this additional period does not affect the conclusion that the Plan was not violated. As to the third indictment, 75 CR 259, the government may be charged with two months and five days, the period from April 1, 1975 to June 6, 1975. Thus, for purposes of Rule 4, the following

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[6] This is not entirely clear. Since the dismissal of 73 Cr. 848 was prospective, it may be that the government is not chargeable with this time.

maximum time periods may be charged against the government:

74 CR 322

Count One:

Cyphers: 40 days

Ferro: 62 days

Count Two:

Cyphers and Ferro: 18 days

75 CR 259

Cyphers and Ferro: 2 months and five days.

Because the government was ready to try each of the three counts within six months of when the appellants were first charged with each count, the government has complied with the Plan.[7]

B. Speedy Trial

Appellant Ferro claims that his constitutional right to a speedy trial was denied. We contend that there has been no such denial of appellant's Sixth Amendment right.

A necessary element in any speedy trial claim is that the claimant be able to show prejudice, *Barker* v. *Wingo*,

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[7] In the District Court, the basis offered by the government for denying the appellants' various motions under the Plan was that there was an excludible period under Rule 5(c)(ii), extending to August 7, 1973. (See affidavit of McDowall, document No. 9 to Record on Appeal). Using August 7, 1973 as the base date, the six month requirement of Rule 4 was not violated as to either appellant. Forty-two (42) days would be added to the calculations (August 7 to September 18) making the longest period 104 days, i.e., as to Ferro on Count One of 74 Cr. 322.

407 U.S. 514, 532 (1972). Prejudice cannot be presumed; there must be a showing that the defendant was actually prejudiced. *United States* v. *Roemer*, 514 F.2d 1377, 1383 (2d Cir. 1975). This prejudice, if indeed there is any at all, usually involves or requires a showing that there has been an impairment of the ability of the defendant to present a defense. *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1315-1316 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974). In this case there has been no showing.

Appellant Ferro has not shown any actual prejudice to his ability to present a defense. Ferro called no witnesses and did not testify. Moreover, and most important, he has not alleged a diminution of memory or loss of witnesses. In his brief, Ferro fails to point to any negative effect on his ability to present a defense resulting from the claimed lack of a speedy trial. Because of this failure, especially when viewed in the light of delays caused by repeated defense motions, a prolonged trial which made the original trial judge unavailable for almost nine months,[8] the subsequent retirement of the original trial judge requiring a reassignment of the case,[9] and the difficulties experienced in producing both appellants in court at the same time, Ferro was not denied his constitutional right to a speedy trial.

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[8] Judge Travia was presiding over the trial *United States* v. *Harry Bernstein, et al.*, between October 1973 and July 1974. On May 3, 1974, Judge Travia offered to reassign the case to another judge. Counsel for Cyphers urged Judge Travia to remain, due to his familiarity with the case (Transcript May 3, 1974, p. 5). Counsel for Ferro didn't object.

[9] Judge Travia retired in October, 1974. Judge Platt, to whom the case was reassigned, assumed the bench in May, 1974.

POINT III

The Trial Judge Did Not Abuse His Discretion in Denying Cyphers the Right to Sum Up in his Own Behalf while Acting As Co-counsel.

Following three days of trial, on January 8, 1976 appellant Cyphers, without counsel and without notice, appeared before the trial judge to ask him some questions. His attorney, who apparently had not been notified, was not present, although the prosecutor was present having been summoned by the District Court (Transcript, January 8, 1976 p. 7). After complaining about various difficulties that he was having with his attorney, Cyphers made the following applications.

> DEFENDANT CYPHERS: Then I am making application to be appointed as co-counsel, if possible, or if not possible, I must ask for a motion to be my own attorney.
>
> THE COURT: I will let you be your co-counsel for the limited purposes of trying the case with Mr. Preminger. I will not, however, let you sum up to the jury.
>
> DEFENDANT CYPHERS: That's fine. I do not want to sum up to the jury, that is the last thing I want to do. Am I now co-counsel for myself?
>
> THE COURT: If you wish.
>
> DEFENDANT CYPHERS: I wish to be co-counsel.
>
> (Trans. January 8, 1976 p. 8)

* * *

> DEFENDANT CYPHERS: Thank you. I have some very important things I want to ask now that I am co-counsel at this moment. I am satisfied with Mr. Preminger when he is at his desk and when he is doing his job for me I am satisfied. I was satisfied with certain things he did and would not want another attorney at this moment other than myself.
>
> The whole application I am making here is for the purpose of finding out something right now which only the Court can answer . . . how am I going to get my witnesses into this courtroom without delaying the trial on any Monday or Tuesday? How may I do this?
>
> (Jan. 8, 1976 pp. 10-11)

Appellant Cyphers now argues that he was denied his right to sum up *pro se*. While a defendant has a constitutional right to proceed without counsel, *Faretta* v. *California*, 422 U.S. 806 (1975), he has no right to participate as a co-counsel in his own case. *United States* v. *Wolfish*, 525 F.2d 457, 462-463 and n.2 (2d Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 794 (1976). *Accord*, *United States* v. *Hill*, 526 F.2d 1019, 1024-1025, (10th Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 1679 (1976), *United States* v. *Lang*, 527 F.2d 1264, 1265 (4th Cir. 1975). Nevertheless, the court may exercise its discretion and allow a defendant to act as co-counsel. *United States* v. *Swinton*, 400 F. Supp. 805, 806 (S.D.N.Y. 1975). This is exactly what Judge Platt permitted appellant Cyphers to do.

Moreover, the trial had been in progress for three days, with numerous witnesses testifying, before Cyphers made his application. His application was, as he in-

dicated, for the sole purpose of allowing him to subpoena witnesses in his own behalf. He did not then or at any other time request permission to personally sum up. Indeed, he expressly stated to the court that he did not wish to "sum up". It is only on this appeal, that for the first time, the appellant asserts, through counsel that he did wish to sum up and that the fact that he did not do so is somehow prejudicial error. This is nonsense.

Since appellant had no right to proceed as co-counsel, and stated that he did not want to deliver a summation, the trial judge properly limited and restricted the scope of the discretionary permission granted the appellant and appellant should not now be permitted to complain especially since the court granted Cyphers exactly what he wanted.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: October 5, 1976

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 714—018—2

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 7th day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Thomas W. Evans, Esq.
20 Broad Street
New York, N.Y. 10005

Wm. J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse - Foley Square
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
7th day of Oct. 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3450350
Qualified in Kings County